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IN THE SUPREME COURT
OF THE STATE OF UTAH

SCM LAND COMPANY,)

Plaintiff-Respondent,)

vs.)

Case No. 19172

WATKINS & FABER, and)

WALTER P. FABER, JR.,)

Defendant-Appellant.)

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD
DISTRICT COURT FOR SALT LAKE COUNTY,
THE HONORABLE PHILIP R. FISHLER, JUDGE

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WALTER P. FABER, JR.,)	
Defendant-Appellant.)	

PREFATORY STATEMENT

SCM's statement that the "Facts have been mis-characterized" by Appellant is simply untrue. The facts cited in Appellant's brief are accurate and uncontested and conclusively establish the basis for the two crucial questions in this case -- (1) Was Fischer's 1979 promise to Watkins & Faber for adjacent office space consideration for the signing of the written 1979 lease?, and, if so, (2) Does Watkins & Faber have any remedy for SCM's refusal to keep the promise?

ARGUMENT

POINT I. THE STATUTE OF FRAUDS DOES NOT PREVENT RESCISSION FOR REFUSAL OF THE PROMISE.

SCM's brief emphasizes the Statute of Frauds and argues that there was not an enforceable oral contract for the adjacent space, and therefore, Watkins & Faber has no

remedy whatever. Even assuming for purposes of argument that the oral promise for the adjacent space could not be specifically enforced because it was not in writing, there is no doubt that the promise was made and that it was specifically made to induce Watkins & Faber to sign the written lease of July 9, 1979. If, as SCM argues, Fischer's promise was meaningless, then in fairness the 1979 lease which would not have existed but for the promise should also be just as meaningless. Contrary to SCM's position that the promise had no value, it is undisputed that it had sufficient value to cause the 1979 lease to be signed.

Because the promise induced Watkins & Faber to sign the 1979 lease, it should not be isolated as an independent transaction which might be unenforceable under the Statute of Frauds. Where valuable consideration was specifically given to obtain the promise, that consideration should be returned or cancelled if the promise is deemed not enforceable because of the Statute of Frauds. If SCM cannot be forced to enter into a lease agreement for the adjacent space, then Watkins & Faber should not be forced to continue performance under the 1979 renewal lease. The Restatement of Contracts, Second, endorses legal principles applicable to this case. Section 141 states as follows:

§141. Action for Value of Performance Under Unenforceable Contract.

(1) In an action for the value of performance under a contract, except as stated in Subsection (2), the Statute of Frauds does not invalidate any defense which would be available if the contract were enforceable against both parties.

(2) Where a party to a contract which is unenforceable against him refuses either to perform the contract or to sign a sufficient memorandum, the other party is justified in suspending any performance for which he has not already received the agreed return, and such a suspension is not a defense in an action for the value of performance rendered before the suspension. [Emphasis added.]

The Statute of Frauds does not invalidate the defense of failure of consideration. Because SCM failed to provide the promised adjacent office space, Watkins & Faber was justified in suspending any further performance under the lease.

Another provision of the Restatement of Contracts, Second, Section 139, directs itself to specific enforcement of oral promises. Even though Watkins & Faber is not seeking specific performance, the section emphasizes the principle that the Statute of Frauds will not be applied where injustice will occur. Section 139 states as follows:

§139. Enforcement by Virtue of Action in Reliance.

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and

which does induce the action, the promise is enforceable notwithstanding the Statute of Frauds, if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;

(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;

(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;

(d) the reasonableness of the action or forbearance;

(e) the extent to which the action or forbearance was foreseeable by the promisor.

One factor in determining whether injustice can be avoided only by enforcement of the promise is the availability or adequacy of other remedies, particularly cancellation.

In this situation, the promise for additional adjacent space was the only reason Watkins & Faber renewed their lease in 1979. Watkins & Faber honored the lease and paid rent until SCM refused to honor the promise. Watkins &

Faber moved from the building because the failure of the promise justified suspension of performance under the lease and cancellation of said lease. It would be unjust to hold Watkins & Faber to a lease which would never have been signed but for the promise which SCM refused to honor.

POINT II. SCM IS NOT ENTITLED TO RELY ON
THE RECORDING ACT.

SCM argued to the lower court that it was a bona fide purchaser under the recording act and has advanced that argument in its brief. The lower court ruled that the recording act was not applicable because Watkins & Faber was not attempting to enforce the oral promise for adjacent space. Even assuming for purposes of argument that the recording act applies to the oral promise given as consideration for signing the 1979 renewal lease, in truth SCM was not a bona fide purchaser because it knowingly assumed the risk of claims and liabilities arising as a result of SCM's later actions which conflicted with prior unwritten tenant obligations. SCM's own purchase documents with Fischer show that SCM considered the possibility of unwritten obligations to tenants. For the purpose of showing that SCM considered the risk and knowingly incurred some liability to tenants under the purchase agreement with Fischer,

Appellant moved to introduce the Exchange Agreement between SCM and Fischer. (R-197). The lower court refused to admit the Exchange Agreement, Exhibit 4D, paragraph 6 of which states as follows:

Indemnification. Company hereby agrees to indemnify and hold Fischer harmless from and against all claims and liabilities arising out of the ownership, operation and management of the Fischer Property from and after the Fischer Property Transfer Date.

On the other side, the lower court admitted the Assignment of the Tenant Leases, Exhibit 1P, paragraph 2 of which states as follows:

. . . It is expressly agreed that Assignee shall have no authority or duty to negotiate, compromise or settle any unwritten obligations of Assignor.

By the above wording, SCM acknowledged the possibility of unwritten obligations to tenants. The lower court erred by not admitting the Exchange Agreement because after SCM purchased the building, SCM entered into a long-term lease with IML thereby preventing fulfillment of the 1979 promise of adjacent space, an unwritten obligation to Appellant. The Assignment of Tenant Leases provides that SCM had no authority or duty to negotiate, compromise or settle the lessor's unwritten obligations, but it clearly does not relieve SCM from liability for SCM's own actions thereafter which interfered with one such unwritten tenant obligation.

By virtue of the Exchange Agreement, SCM specifically assumed all liability for SCM's actions which might have compromised unwritten obligations whose performance had not taken place. It is obvious from the wording of the two documents that SCM considered that its act~~ion~~^{ion} could conflict with unwritten obligations Fischer owed to Newhouse tenants. Nevertheless, SCM consciously chose not to inquire of the Newhouse tenants, including Appellant, before it purchased the Newhouse Building and gave IML a long-term lease on the sixth floor.

SCM's long-term lease of the sixth floor to IML conflicted with the unwritten promise of additional space to Appellant. Since SCM expressly assumed responsibility for its actions and was not a bona fide purchaser, it should not be allowed to deny the promise and prevent termination of the 1979 lease.

CONCLUSION

The Statute of Frauds does not invalidate Appellant's defense of failure of consideration.

Even if the recording act were applicable to this situation, SCM is not a bona fide purchaser. The promise of adjacent office space was consideration for signing the 1979 renewal lease. It would be unjust to hold Watkins & Faber

to a lease which would never have been signed but for the promise of adjacent space and deny any relief whatever for failure of the promise.

Respectfully submitted this 19th day of October, 1983.

WATKINS & FABER

By Brian W. Burnett
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CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) copies of the foregoing Appellant's Reply Brief to Henry K. Chai II, Snow, Christensen & Martineau, Attorneys for Plaintiff-Respondent, 11th Floor, Newhouse Building, 10 Exchange Place, Salt Lake City, UT 84111, postage prepaid, this 19th day of October, 1983.

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